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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 321

NATRON SODA COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 12, 1922.

(27,475)

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SUPREME COURT OF THE UNITED STATES

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NATRON SODA COMPANY, APPELLANT,

vs.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 4, 1920.

1 In the United States Court of Claims.

No. 32453.

NATRON SODA COMPANY, a Corporation, Claimant,

vs.

THE UNITED STATES, Defendant.

I. *Petition and Exhibit* 1.

Filed April 16, 1913.

The petition of claimant respectfully shows to the Court:

1. That it is a corporation created and existing under the laws of the State of California, with its principal office in the city and County of San Francisco in said State, and a branch office in Washoe County in the State of Nevada.

2. That your petitioner has a claim against the United States of America under the implied contract for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged.

2 3. That the said claimant is now and was at all the times herein complained of the sole owner of certain mining claims located under the mining laws of the United States by the claimant's predecessors in interest upon then otherwise vacant and unappropriated public lands of the United States after the discovery on each of said claims by said locators, who were then and there citizens of the United States, of valuable mineral, to-wit, soda, in commercial quantities. That the said locators and the claimant as their successor in interest in said claims have been at all times since their location, in the sole and exclusive possession thereof and have performed more than $500 worth of work on each of said claims. A description of these claims together with a statement of the locators thereof is hereunto attached, marked "Claimant's Exhibit No. 1."

4. That at the time said lands were acquired by claimant and its grantors a portion of them were *were* covered by Big Soda Lake in said Churchill County, Nevada, which said Lake is located on what is known to the United States Geological Survey as the bed of Lake Lahontan, which Lake is in a volcanic depression about seventy-five feet below the level of the surrounding country. That the waters of said Lake were very strongly impregnated with soda and that in said region the annual rainfall is about 4.4 inches.

5. That prior to the year 1906 claimant had constructed on the margin of said Lake about twenty acres of vats at a cost of about

3 $40,000, into which said vats the Lake water was directed and after the water in these vats had evaporated, soda crystals were precipitated, so that as a result of claimant's operations it recovered each year for many years about 500 tons of soda which it sold at a profit of $10 a ton over and above the cost of production. That in addition to said vats, claimant prior to said year 1906 had bought and erected upon the shore of said Lake a carbonating furnace costing about $13,000, and a reverberating furnace costing about $3,000, and in addition thereto had expended a large sum of money in buildings and other equipment for the conduct of its business of recovering soda from the waters of its said Lake. That in the year 1906 claimant was ready to produce in addition to the form of soda which it was then producing, bath crystals at a very low cost, from which its profits would have been more than $5,000 a year, and that claimant's total investment in said equipment was about $70,000. That said Lake and the land surrounding said Lake owned by claimant, were prior to the year 1906 of the value $50,000.

6. That in the year 1904 the Reclamation Service of the United States, under provision of law of the United States, commenced the building of canals to float water from the Truckee River twenty miles into the Carson River for irrigation of the so-called Fallon Area in said Churchill County in the said State of Nevada, said work being carried on under the designation of the Truckee-Carson Irrigation Project, and in the year 1906 the United States turned water into these canals.

4 7. That for several years continuously, and now continuously, the said Government of the United States of America, in the exercise of its power of eminent domain under the Constitution of the United States, and by authority of the acts of Congress duly empowering its officers and agents thereto in that case made and provided, did construct, build and maintain, and continuously since has been constructing, building and maintaining, and are now constructing, building, maintaining and carrying water in certain canals in furtherance of certain reclamation projects in a certain area known as the Fallon Area by said Reclamation Service, said canals practically surrounding the said Big Soda Lake, the property of your said petitioner, and by reason of seepage of said water from said canals through the clay and sand strata composing the soil in the intervening space, have caused the water in said Lake to rise to so high a level as to submerge, overwhelm and appropriate the plant and equipment installed at great expense by your petitioner for the purpose of taking, preparing and marketing the said soda in its various forms as herein described, thereby rendering it impossible for it to engage in said business, for which purpose and no other your petitioner acquired title to the said tracts of land and built and installed said plant and equipment, which are fixtures and immovable.

8. That in the year 1907 claimant discovered that there was a much greater rise in the waters of the Lake than normally occurred, and measurements were commenced which showed that this rise was due to other causes than the normal rainfall per annum.

5 9. That immediately the Secretary of the Interior was notified of this condition and that claimant believed it to be due to seepage from said above described canals, built as aforesaid by the United States, and that during the said year such a large amount of water came into said Lake from said canals that evaporation did not bring the water of the Lake which was brought into the vats during said year up to a crystallizing point. That during the years 1907 and 1908 said claimant spent much money in raising its levees and endeavoring to overcome said seepage but it continued and the depth of the Lake not being reduced by evaporation as had occurred for all the years known to man prior to 1907, has grown greater and the waters have risen until since the year 1907 said vats and the other property hereinbefore described, owned by claimant, have been completely flooded by the seepage from said canals and in this way have been appropriated by the United States, without any compensation to claimant. That in addition to appropriating said property of claimant, the United States has by reason of its construction and use of said canals so raised the waters of said Lake which contained a very large tonnage of carbonate of soda and of salts available for bath crystals as to prevent claimant from carrying on its business of extracting and obtaining the same, and in this way has appropriated the waters of said Lake and made it impossible for said claimant to use them for the purpose for which it purchased them, (and has damaged claimant in this way the sum of $100,000.) That the soil around said Big Soda Lake and generally in the vicinity is largely sand and clay of a character subject to seepage of the water from said canals. That in the area described since the year 1905 down to the present time the
6 annual rainfall has been normal.

10. That claimant and its grantors acquired this property in the year 1879, and between the years 1880 and 1907 had taken each year as the result of the evaporation hereinbefore described sesqui carbonate of soda which was precipitated in said vats and when this had occurred the mother liquor was pumped into the lake and the year's crop taken up by your petitioner; but that since said year 1907 your petitioner has never been able to make a crop of said soda because of the rise of said water, and further because its plant for the evaporation and preparation of said soda has been taken possession of by the United States, through its being submerged by the water from said canals. That said land and said Lake are valuable for no other purpose and were purchased by claimant for the purpose only of securing from them the carbonate of soda.

11. And your petitioner further shows that the said acts of the Government of the United States, in constructing, building and maintaining said canals, as aforesaid, have been done and are being done lawfully by the officers and agents of the United States in the exercise of its powers of eminent domain under the Constitution of the United States and the laws of Congress, for the public purpose of reclaiming and rendering cultivable said Fallon area for a public use, purpose and benefit.

12. Your petitioner further alleges and shows that by reason of the premises there is due and owing to the petitioner by the
7 United States, for and in consideration of the facts hereinbefore alleged and the appropriation and taking of the said lands, waters of said Lake and said plant and equipment and for the profits which claimant could have derived from the business of said petitioner, through the said operations of the Reclamation Service for a public use and purpose, in the manner and form heretofore alleged, the sum of $170,000, the value of the lawful compensation for such property so taken and the profits that should have been so derived, as aforesaid.

The premises considered, claimant prays for judgment against the defendant in the sum of One Hundred and Seventy Thousand Dollars.

THE NATRON SODA COMPANY,
By E. GRISWOLD,
President.

CLARENCE E. DAWSON,
Attorney for Claimant.
F. S. BRIGHT,
Of Counsel.

8 STATE OF CALIFORNIA,
County of Alameda, ss:

E. Griswold, being sworn, says that he is the President of The Natron Soda Company, claimant in the above entitled petition by him subscribed as President; that he has read said petition and knows the contents thereof, and that the statements therein made are true to the best of his information and belief.

E. GRISWOLD,
President, The Natron Soda Company.

Subscribed and sworn to before me this 7th day of April, 1913.
W. E. RODE,
Notary Public.

"CLAIMANT'S EXHIBIT No. 1."

Description of Land Claims to which Petitioner is Entitled to Patent.

That certain real property commonly known and called The Big Soda Lake property, consisting of the Big Soda Lake, and including those certain pieces, parcels and tracts of land, and of land under water, and the mineral and valuable properties of the water covering said land, and the mineral and valuable properties and deposits in such land, situate, lying and being in the County of Churchill, in the State of Nevada, and described as follows, to-wit:

9 1. Those certain parcels of placer or mining ground located by C. W. Browning, W. D. Epperson, J. O. Traynor, J. Page, Jos. Smith, John Halloway, M. V. Gilbert and John Lee,

commencing at a stake of the meandered line of what is known by the name of "Soda Lake North," near the North East corner of the South East quarter of the South West quarter of section seven (7) in township nineteen (19) North Range Twenty-eight (28) East of Mount Diablo base and meridian; thence running North to the North East corner of the South West quarter of section seven (7) aforesaid; thence East ten chains; then North ten chains; thence East ten chains; thence North to the South East corner of the North East quarter of the North East quarter of section seven (7) aforesaid; thence East to the section line between sections 7 and 8 in said township; thence North on said section line to the place where it cuts the meandered line of said Lake; thence East and South on the meandered line as reported by the United States Surveys to the South West corner of the South East quarter of the North West quarter of section eight (8); thence West to the South West corner of the South East quarter of the section seven (7) aforesaid; thence South to the place where the line will cut the meandered line of the said Lake according to the United States Surveys; thence West on the meandered line to the place of beginning, containing one hundred and fifty-six and 86/100 acres of land, more or less.

2. Those certain parcels of placer mining ground located
10 by Jas. W. Richards, Thomas A. Fagan, D. W. Bushnell, B. F. Gray, J. B. Gray, James Fagan, W. C. Dillard and D. H. Dillard, beginning at a stake of the meandered line of said Soda Lake North, near the North East corner of the South East quarter of the South West quarter of section seven (7) in township 19 North of Range 28 East; thence North to the North East corner of the South West quarter of said section seven (7); thence East ten chains; thence North ten chains; thence East ten chains; thence North to the South East corner of the North West quarter of the North East quarter of section seven (7); thence East to the section line between section 7, and thence North on the section line to a stake where said section line intersects the meandered line of the Lake aforesaid; thence on the meandered line West and South according to the United States Surveys to the place of beginning, containing one hundred and forty-eight and 70/100 acres of land, be the same more or less.

3. All of those certain parcels of placer mining ground located by Geo. Stone, Wm. H. Troop, Wm. Troop, George C. Troop and Oscar Troop, and deeded to said Geo. W. Stone by said Wm. H. Troop, George C. Troop and Oscar Troop, described and bounded as follows, to wit: Beginning at the first stake of the meandered line of Soda Lake North, aforesaid, West of the Willow Spring, said spring being located on the South side of said Lake near the section line between sections 7 and 8 in township aforesaid between the
11 East and West half of the South East quarter of section 7 aforesaid, to the North East corner of the North West quarter of said section seven; thence East on the division line between the South half and the North half of section seven (7), and on the same line through to section eight (8) to the place where the line will intersect the meandered line of the said Lake; thence South and

South West on the meandered line according to the United States Surveys back to the place of beginning, all in said Township 19 North, Range 26 East, containing ninety-seven and 28/100 acres, be the same more or less;

Also Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), and Twelve (12), and the North East quarter of the North West quarter of section seven in Township 10 North of Range 28 East, Mount Diablo Base and Meridian, containing four hundred and two and 84/100 acres, more or less;

Also the West half of section eight, as outside of the meandered line of the aforesaid Soda Lake, Township 19 North, of Range 28 East, M. D. B. & M., all in Churchill County, Nevada.

12 II. *History of Proceedings.*

On May 26, 1913, the defendants filed a demurrer to claimant's petition.

On the same day the demurrer was submitted.

On June 2, 1913, the court filed an order overruling the demurrer.

III. *Amendment of Petition Filed by Leave of Court Feb.* 17, 1919.

Comes now the claimant, by its attorneys, and leave of the Court having been first obtained, amends the petition filed in the above-entitled cause by adding to paragraph number twelve thereof the following sentence:

That no assignment or transfer of your petitioner's claim or any part thereof or interest therein has been made; that your petitioner is justly entitled to the amount herein claimed after allowing all just claims, credits and offsets; that your petitioner has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States; and that he believes the facts stated in this petition to be true:

F. S. BRIGHT,
H. STANLEY HINRICHS,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

H. Stanley Hinrichs, being sworn, says that he is counsel for the claimant in the above-entitled cause, that he has read the above amendment of petition and knows the contents thereof, and that the statements made therein are true to the best of his knowledge, information and belief.

H. STANLEY HINRICHS.

Subscribed and sworn to before me this 16th of January, 1919.

[SEAL.] JOHN F. A. BECKER,
Notary Public, District of Columbia.

13 IV. *History of Further Proceedings.*

On March 10, 1919, the case was argued and submitted on merits by Mr. Frank S. Bright and Mr. H. Stanley Hinrichs, for claimant, and by Mr. K. E. Steinhauer, for defendants, in connection with the case of John Horstmann Company, No. 32,004.

On April 7, 1919, the court filed findings of fact and conclusion of law and entered judgment in favor of the defendants in the sum of $884.46 and dismissed claimant's petition, with an opinion by Hay, J.

On June 4, 1919, the claimant filed a motion for a new trial and for amendment of findings.

On October 20, 1919, the court entered an order overruling claimant's motion for new trial; allowing in part and overruling in part the claimant's motion to amend findings. Former findings of fact vacated, set aside and withdrawn and new findings this day filed. Former judgment and opinion to stand.

V. *Findings of Fact (as Amended), Conclusion of Law, and Opinion by Hay, J., Entered October 20, 1919.*

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is a corporation, duly organized and existing under the laws of the State of California, and it and its predecessors in interest were at the time mentioned herein the owners of certain lands in Churchill County, State of Nevada, surrounding and including a lake known as Big Soda Lake, which it owned in fee simple to wit: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, and the northeast quarter of northwest quarter of section 7, and also the west half of section 8, all in township 19 north, of range 28 east, Mount Diablo base and meridian.

14 II.

Prior to and during the year 1906 the said lake and the lands surrounding it were in the actual possession of the plaintiff and its predecessors, who were manufacturing soda from the waters of said lake. This soda was marketed by the plaintiff, and this product so manufactured and marketed made the lake aforesaid valuable to the plaintiff.

A plant for the recovery of the mineral contents of the waters of Big Soda Lake had been constructed many years prior to the acquisition of the property by the plaintiffs, and had been improved and added to by it, and was in full operation in the year 1906.

III.

Big Soda Lake is situated in an area known as the Carson Sink Valley (a depression in the earth's surface covering many thousand acres), which was, during a past geologic age, the bottom of an inland sea, now called Lake Lahontan. The slope of said depression in the neighborhood of Big Soda Lake is in a general northeasterly direction with a grade of about 10 feet to the mile. The detail of the topography within this depression has been modified by the elements since the desiccation of Lake Lahontan. These modifications consist of surficial deposits of sand, clay, silt, cinders, and other forms of disintegrated rock substance, and some of them have in some places solidified into stone or become consolidated into compact and impervious areas of various sizes and shapes called playas. Fissures and cracks exist throughout the mass, the occurrence of these various features or constituents not being uniform. The lowest depressions in the earth's surface within this area are the Big and Little Soda Lakes and the Carson River. Prior to the year 1907 the surface of the Big Soda Lake was about 3,935 feet above sea level. The Carson River approaches within two miles of said lake, at which point its altitude is about 4,000 feet, and it flows in a general easterly direction until it reaches a point near the town of Fallon, at which it turns and runs in a general northerly direction.

IV.

The Big Soda Lake is the result of accumulations of water in a volcanic crater drawn from the general body of underground waters in the valley. This crater forms an inverted conical depression in the floor of said Lake Lahontan, with a rim rising from 80 to 100 feet above the floor of the present valley and with deep converging inner walls.

V.

The seasonal rainfall upon the valley floor averages about 4 inches, and is practically negligible as a source of ground water replenishment. The bottom of said lake was below the level of the water table, and the only known source of water supply was the small springs which seeped into the lake. These springs were supplied by seepage from the Carson River.

Percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move underground. The slope of the Carson Valley is in a northeasterly direction.

VI.

From prior to 1867 to 1906 the level of Big Soda Lake had not raised more than 2 feet.

15

VII.

In 1906 the United States Reclamation Service, acting under authority of acts of Congress, constructed the Truckee-Carson project, consisting of dams, canals, and other structures, whereby large quantities of surface waters theretofore confined to the watershed of the Truckee River were in 1906 and during each year since then transported to the watershed of the Carson River. This water, together with surface waters entering the Carson River from its own watershed, were by this irrigation project conserved, controlled, and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes. Among the units comprising this irrigation system is a dam known as Lahontan Dam, and canals known as T-line canal, U-line canal, and N-line canal, and Truckee Canal, with their laterals. Each of said canals passes within two miles of Big Soda Lake except the Truckee Canal, and in the neighborhood of the lake their altitude is about 100 feet higher than the lake, and about 40 feet higher than Carson River. This irrigation system transports large amounts of water through each of said units during the irrigation season of each year, which includes the months of April to September, inclusive, and stores large quantities of water in said Lahontan Dam during every month of each year.

VIII.

With the advent of the Truckee-Carson project, the body of ground water in the entire section covered by the project rose; the volume of water in Big Soda Lake has continually increased, and the level of said lake has risen about 19 vertical feet during the period from 1906 to 1916; the recovery of minerals from the waters of said lake is no longer possible; the machinery, vats, houses, and other improvements which constitute the manufacturing plant of the plaintiff have been permanently flooded; the land of the plaintiff immediately surrounding said lake has been inundated, and the value of the property of the plaintiff has been destroyed.

IX.

The plaintiff's predecessors in interest conveyed to the United States of America a right of way over 3,133.9 feet of the lands of the plaintiff in the northeast quarter of northwest quarter of said section 7, for the construction of the Truckee-Carson project. Said conveyance recites that it was made in consideration of $1. A prior contract in writing between plaintiff's predecessor in interest and the United States, in which it was agreed that said right of way would be granted to the United States, contained the following provisions:

"The first party, in consideration of the benefits to be hereafter derived from the construction of irrigation works through or in the vicinity of the lands hereinafter described, agrees that the second

party may enter on, survey for, grade, and construct, canals or ditches upon or across the lands of the first party."

"It is further agreed that in consideration of the premises, the first party hereby releases the second party from all claims for damages for entry, survey, or construction of said works."

The deed made in pursuance of said contract contained neither of the provisions quoted above.

X.

From the time the Truckee-Carson canal project was completed in 1906 to the year 1915 over 26,000 acres of additional land had been subjected to irrigation under the project, there having been 14,000 acres under irrigation theretofore. In its ultimate development the project contemplates the reclamation of 206,000 acres of land. The canals of the project ramify an area of close to 100,000 acres.

16 XI.

No negligence on the part of the defendants is alleged or proven in the construction or operation of the canals of the project.

XII.

The value of the property of the plaintiff which has been destroyed is $45,000.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover, and that its petition ought to be, and it is hereby, dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the chief clerk and collected by him in the manner prescribed by law.

Opinion.

HAY, *Judge,* delivered the opinion of the court:

This is a suit brought by the plaintiff (the Natron Soda Company) against the United States for the alleged taking of its property, a so-called soda lake situate in the State of Nevada. This lake, known as Big Soda Lake, had been in the possession of the plaintiff and its predecessors in interest for a number of years prior to the year 1906. From the waters of this lake the plaintiff manufactured and marketed a carbonate of soda, a valuable product; and the plaintiff had constructed and maintained a plant for the recovery of this soda from the waters of this lake. This plant was in full operation in the year 1906.

Big Soda Lake is situated in an area known as the Carson Sink

Valley, a depression in the earth's surface covering many thousand acres of land, which was during a past geologic age the bottom of an inland sea, now called Lake Lahontan. The slope of this depression in the neighborhood of Big Soda Lake is in a general northeasterly direction with a grade of about 10 feet to the mile. The lowest depressions in the earth's surface within this area are the Big and Little Soda Lakes and the Carson River. Prior to the year 1907 the surface of the Big Soda Lake was about 3,935 feet above sea level. The Carson River approaches within 2 miles of this lake, at which point its altitude is about 4,000 feet, and it flows in a general easterly direction until it reaches a point near the town of Fallon, at which it turns and runs in a general northerly direction.

The Big Soda Lake is the result of accumulations of water in a volcanic crater drawn from the general body of underground waters in the Carson Sink Valley. This crater forms an inverted conical depression in the floor of Lake Lahontan with a rim rising from 80 to 100 feet above the floor of the present valley and with deep converging inner walls.

The seasonal rainfall upon the valley floor averages about 4 inches, and is negligible as a source of ground water replenishment. The bottom of this lake was below the level of the water table, and the only known source of water supply was the small springs
17 which seeped into the lake. These springs were supplied by seepage from the Carson River, the only known source of supply of underground water of this valley. These underground and percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move underground.

From prior to 1867 to 1906 the level of Big Soda Lake had not raised more than 2 feet.

In 1906 the United States Reclamation Service, acting under authority of acts of Congress, constructed the Truckee-Carson project, consisting of dams, canals, and other structures, whereby large quantities of surface waters theretofore confined to the watershed of the Truckee River were in 1906, and during each year since then, transferred to the watershed of the Carson River. This water together with surface waters entering the Carson River from its own watershed, was by this irrigation project conserved, controlled, and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes. Among the units comprising this irrigation system is a dam known as Lahontan Dam, and canals known as T line canal, U line canal, and N line canal, and Truckee canal with their laterals. Each of said canals passes within two miles of Big Soda Lake except the Truckee canal, and their altitude is about 100 feet higher than the lake and about 40 feet higher than Carson River. This irrigation system transports large amounts of water through each of said units during the irrigation season of each year, which includes the months of April and September, and stores large quantities of water in the Lahontan Dam during every month of each year.

The plaintiff's predecessors in interest conveyed to the United States a right of way through its lands for the construction of the Truckee-Carson project in consideration "of the benefits derived

from the construction of irrigation works through or in the vicinity of the said lands." The contract by which the plaintiff's predecessors in interest agreed to convey said right of way to the United States contained the following provision: "It is further agreed that in consideration of the premises, the first party hereby releases the second party from all claims for damages for entry, survey, or construction of said works." The deed made in pursuance of said contract did not contain the aforesaid provision. The evidence does not disclose what, if any, damage resulted to the plaintiff from the construction of any of said works on the land of the plaintiff.

With the advent of the Truckee-Carson project the body of ground water in the entire section covered by the project rose; the volume of water in Big Soda Lake has continually increased, and the level of said lake has risen about 19 vertical feet during the period from 1906 to 1916; the recovery of minerals from the waters of said lake is no longer possible; the machinery, vats, houses, and other improvements which constitute the manufacturing plant of the plaintiff have been permanently flooded; the land of the plaintiff immediately surrounding said lake has been inundated; and the value of the property of the plaintiff has been destroyed.

From the time the Truckee-Carson project was completed in 1906 to the year 1915 over 26,000 acres of additional land had been subjected to irrigation under the project, there having been 14,000 acres under irrigation before the project was completed.

18 No negligence on the part of the defendants is alleged or proven in the construction or operation of the canals or units of the project.

The value of the property of the plaintiff which has been destroyed is $45,000.

Under this state of facts is the United States liable for the destruction of the plaintiff's property under the fifth amendment of the Constitution?

It is well settled that the fifth amendment to the Constitution, which provides that private property shall not be taken for public use without just compensation, does not impose upon the United States any greater liability than would attach to an individual or ordinary corporation. So far as we have been able to ascertain, it has never been held that this amendment amplifies or enlarges the responsibility of the Government beyond the legal liability of persons, either natural or artificial. Indeed, this doctrine has been asserted by the Supreme Court of the United States, not, it is true, with respect to cases involving irrigation projects, but in cases involving the rights of riparian owners who have sought to recover for damages to their property caused by the Government in its work in improving navigable streams. Bedford v. United States, 192 U. S., 217, 223; Jackson v. United States, 230 U. S., 1, 21, 22.

There is no dispute about the powers of the Government to construct the works which, it is claimed, caused the destruction of the plaintiff's property. It is alleged by the plaintiff that the Government in the exercise of its power of eminent domain under the Constitution of the United States, and by authority of the acts of Congress, did construct, build, and maintain certain canals, etc. Nor is the legality of the acts of the Government in any way questioned

by the plaintiff. Indeed, the plaintiff conveyed to the defendants a right of way through its land for the construction of the canals, of the result of which construction the plaintiff now complains. If, therefore, the United States can not be held any more liable than an individual or ordinary corporation for the acts complained of, it becomes important to inquire to what extent, if any, an individual, or ordinary corporation, could be held liable for the destruction of the plaintiff's property under the state of facts disclosed by the record.

The plaintiff is the owner of a lake which for many years has been used by it and its predecessors to manufacture soda from its waters, and it has erected a plant consisting of vats, houses, etc., to aid it in this manufacture. The irrigating system, where put into operation, causes an increase of underground water not only affecting the plaintiff but the whole territory in which the land of the plaintiff is situated. The question then is, would the plaintiff have the right, as against an individual or ordinary corporation to prevent him or it from irrigating the lands of this valley, if such irrigation has the effect of increasing the quantity of underground water, to such an extent as to submerge the lake of the plaintiff and destroy the value of its property? It hardly seems possible to reconcile such a right with the rights of landowners, or to fix any reasonable limits to the exercise of such right. Such a right as that contended for would practically prevent the irrigation of all the lands in the Carson Sink Valley. Suppose a man irrigated his own land, and the amount of percolating water which found its way into the lake of the plaintiff had a sensible
19 effect upon it, it would not be contended that an action would be maintainable. But if all the landowners of the Carson Sink Valley irrigated their lands, and thereby increased the amount of underground water to such an extent as to destroy the property of the plaintiff, could the plaintiff maintain an action against any one of them, or could it maintain an action against a corporation which did the same thing as the owners themselves could do? Such a right as that claimed by the plaintiff is too indefinite and unlimited. The principles applicable to surface waters do not pertain to underground waters, which have no certain course or defined limits. In the case of Kansas v. Colorado, 206 U. S., 46, 107, the court says: "Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is poured, is something, proof of which must necessarily be almost impossible. The underground movement of water will always be a problem of uncertainty." Percolating water is a hidden, invisible thing. How it moves is more a matter of conjecture than knowledge—of inference rather than proof. It would seem impossible to apply any law, beyond the general principle of reasonable use of one's land, to such a hidden and formless thing. Weil on Water Rights, vol. 2, p. 1093. It seems, therefore, that the existence, origin, movement, and course of underground waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be practically impossible, because any such recognition of correlative rights would interfere to the

material detriment of the Commonwealth with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and general progress of improvement in works of embellishment and utility. Angell on Watercourses, 7th edition, 171.

It seems to us that while the property of the plaintiff may have been destroyed by the irrigation system of the Government, yet the influences which have brought about this destruction are so secret, changeable, and uncontrollable that we can not subject them to the regulations of law, nor build upon them a system of rules as has been done with streams upon the surface; so that if the plaintiff has incurred a loss from the movement of these underground waters in this valley it is damnun absque injuria.

It would appear that the claim of the plaintiff is that primitive conditions must be suffered to remain, and that no progress or development can be had, if the property of the plaintiff should be injured thereby. Thus a claim is set up to a vested right to keep conditions in statu quo which existed at the time its property was acquired to the extent of preventing anyone from improving surrounding property, unless damages are paid to the plaintiff. Such a doctrine would result in preventing the owners of surrounding property from putting their property to its legitimate use.

From the very nature of the case, and the character and movement of underground water we conclude that the property of the plaintiff was not destroyed by a direct invasion, but was the incidental consequence of the lawful and proper use of a government power, and therefore there can be no recovery.

20 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Twentieth day of October, A. D., 1919, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the Natron Soda Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and against the defendants, the United States; and that the petition herein be and it hereby is dismissed. And it is further ordered, adjudged and decreed that the defendants, the United States, shall have and recover of and from the claimant, the Natron Soda Company, as aforesaid, the sum of Eight Hundred and Eighty-four Dollars and forty-six cents ($884.46), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VII. *History of Further Proceedings.*

On November 17, 1919, by leave of court, the claimant filed a motion to amend the new findings of fact, which motion was overruled by the court, January 12, 1920, in an opinion by Hay, J., which is as follows:

21 VIII. *Opinion by Hay, J., Entered January* 12, 1920, *on Claimant's Motion to Amend Findings of Fact.*

HAY, *Judge*, delivered the opinion of the court:

This is a motion of the plaintiff to amend the findings of fact in this case (1) so as to show the ultimate facts as to the cause of the rise of water in Big Soda Lake and the inundation of the adjacent land which resulted in the destruction of the plaintiff's property, or (2) by setting forth what the plaintiff asserts are "the circumstantial facts" shown in the evidence as to the cause of the rise of water in Big Soda Lake and as to the value of the property of the plaintiff.

The rules of the Supreme Court regulating appeals from and governing the findings of fact in the Court of Claims were promulgated at the December term, 1865; 3 Wall., p. VII. These rules prescribed that "The facts so found are to be ultimate facts or propositions which the evidence shall establish in the nature of a special verdict, and not the evidence on which these ultimate facts are founded."

At the October term, 1873, a change was made in the above rule, and that rule now reads as follows: "A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; * * *," 17 Wall., p. XVII. Since then no change in this rule has been made.

At the December term, 1869, rule 5 was promulgated as follows:

"Rule 5. In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on the appeal to this court." 9 Wall., VII.

On January 29, 1879, the Supreme Court promulgated a substitute for the above rule, which is as follows:

"In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact." 97 U. S., p. 11.

The findings of fact which the plaintiff seeks to have amended contain, in the opinion of the court, the facts established by the evidence in this case. What the plaintiff seeks to add as amendments to the findings of the court are not facts established by the evidence, but evidence of facts; and such findings would be in contravention of the rule which provides that the court must find "the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them." In the case of Burr v. The Des Moines Railroad and Navigation Co., 1 Wall., 99, 102, the Supreme Court says:

"The statement of facts on which this court will inquire if there is or is not error in the application of the law to them is a statement of the ultimate facts or propositions which the evidence is intended to establish and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon."

See also McClure v. United States, 116 U. S., 145, 151, 152.

22 In the case of The Delaware, Lackawanna and Western Railroad Co. v. United States, decided January 6, 1919 (and not yet reported), Chief Justice Campbell, speaking for the court, says:

"Under the rules of the court and its decisions it is not difficult for parties to make requests for findings in accordance with the well-established practice. But these requests are frequently mere conclusions of fact or of law, intermixed with argument, find no support in the evidence adduced, and omit the references required by the rules."

In the case at bar the court has found the facts as they are established by the evidence, and has included in its findings all the facts established by the evidence which "have been proven and which are material to the due presentation of the case of the plaintiff." It will not be asserted that under rule 5 quoted above the plaintiff or defendant can of right have included in the findings of fact evidence of facts which he may assert to be facts established by the evidence. In other words, the rule can not be construed to mean that this court must include in its findings any evidence which the parties may ask to have included therein upon the mere statement that such evidence is a fact proven. This court in the last analysis must determine what are the ultimate facts which the evidence establishes. McClure v. United States, supra. If it was left to the parties to say what the findings of the court must include it is obvious that the findings of the court would no longer contain facts established by the evidence in the nature of a special verdict, but would be made up of all the evidence in the case and would impose upon the appellate court all the functions of a jury.

The plaintiff has referred us to the case of United States v. Pugh, 99 U. S., 265, 270, which it insists is applicable to this case. In that case the Supreme Court held that "when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record."

But this is not the case of the plaintiff. Its case does not depend upon "circumstantial facts alone." Indeed, what it denominates circumstantial facts are evidences on which the ultimate facts are supposed to rest, and this court has found those ultimate facts and has put into the record every fact which the plaintiff has proved and which is material to the due presentation of its case. What the plaintiff asks us to find are conclusions, and not ultimate facts established by the evidence.

The motion to amend the findings of fact must be overruled.

23 IX. *Claimant's Application for, and Allowance of, an Appeal to the Supreme Court.*

Claimant hereby prays an appeal to the Supreme Court of the United States from a judgment of this court rendered on the 12th day of January, 1920, reaffirming a judgment rendered on the 7th day of April, 1919, and the 20th day of October, 1919, by which the petition was dismissed.

FRANK S. BRIGHT,
Attorney for Claimant.

Filed January 29, 1920.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

February 2, 1920.

24 Court of Claims of the United States.

No. 32453.

NATRON SODA COMPANY, a Corporation,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the opinion of the court by Hay, J., on the claimant's motion to amend findings of fact; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 7th day of February, A. D. 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,475. Court of Claims. Term No. 720. Natron Soda Company, appellant, vs. The United States. Filed February 12th, 1920. File No. 27,475.